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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil No. 28724

ALL STATES FREIGHT, INC., ET AL.,
Plaintiffs

vs.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, ET AL.,
Defendants

STATEMENT AS TO JURISDICTION

Conformably with Rule 12 of the Rules of the Supreme Court of the United States, plaintiff, ALL STATES FREIGHT, INC., submits its statement of the basis upon which the Supreme Court has jurisdiction to review the judgment of the District Court entered in this cause.

Opinion Below

The specially constituted District Court did not write separate opinion. It made findings of fact and conclusions of law and entered a final judgment dismissing the complaint on April 28, 1952, which have not as yet been reported. A copy of the findings of fact, conclusions of law and the final judgment are attached hereto as Exhibit A.

Jurisdiction

The judgment of the District Court was entered on April 28, 1952. A petition for appeal is presented to the District Court herewith, to-wit, on May 23, 1952. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of Title 28, United States Code. The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment in this case on direct appeal: *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515; *American Trucking Association* v. *United States,* 326 U. S. 77; *United States* v. *Detroit and Cleveland Navigation Company,* 320 U. S. 326.

Questions Presented

1. Is an order of the Interstate Commerce Commission valid, where the Commission has entered such order in plain disregard of the evidence?

2. May the Interstate Commerce Commission, in disposing of an application for radial authority, deny lesser authority to serve certain points, which had been recommended by a Joint Board, fully cognizant of the transportation picture of the particular locality, where the evidence plainly sustains the right to serve the points?

3. May the Interstate Commerce Commission, in disposing of an application for authority to continue an operation, decide the case as if it had before it an application for authority to commence a new operation?

Statute Involved

Section 207(a) of the Motor Carrier Act of 1935, (49 U.S.C., Section 307) provides:

> "Subject to section 210 of this title, a certificate shall be issued to any qualified applicant therefor, authoriz-

ing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

Statement

Appellant, plaintiff below, hereinafter referred to as ALL STATES is a common carrier by motor vehicle of general commodities. The present action was brought to set aside and annul an order of the Interstate Commerce Commission hereinafter referred to as the COMMISSION, entered on December 10, 1951, denying to ALL STATES a certificate of public convenience and necessity to serve seven points in Ohio, as intermediate or off route points in connection with its regular route service.

ALL STATES, on January 20, 1936, duly filed its so-called "grandfather" application for a certificate of convenience and necessity under Section 207(a) of the Motor Carrier Act. On July 1, 1940, it filed an application under Section 207 of that Act asking for a certificate for the same authority as requested in the "grandfather" application on the grounds of public convenience and necessity. After hearings, litigation, and further hearing, the COMMISSION entered an order granting All States rights as a regular route carrier operating generally between Chicago and points on the New England coast, serving various intermediate points. The order of the Commission which was entered an order granting ALL STATES rights as a regular over irregular routes on all points North of Ohio highways 40 and 42, and all points on the regular routes granted,

restricting such irregular route service to delivery of west-bound shipments and pick-up of east-bound shipments.

Mansfield, Ohio, is one of the intermediate points on the regular routes granted which may be served without restriction. It is surrounded by many smaller points which are on the irregular routes and service to them is thus restricted to the delivery of west-bound shipments and pick-up of east-bound shipments.

ALL STATES has been serving seven of these towns without restriction for an undisclosed period in the past. Upon being denied the right to continue to serve these towns by the decision in its "grandfather" case, and companion case under Section 207, it applied for and received from the COMMISSION an extension of the effective date of the order denying the right to serve these towns without restrictions. Said effective date would have expired on May 13, 1952 had it not been extended to May 27, 1952 by the District Court.

In order to be able to continue to serve the Mansfield area as it had been doing in the past, ALL STATES, in May 1950, filed an application seeking authority as a matter of public convenience and necessity under Section 207(a) of the Motor Carrier Act, to serve without restriction the town of Carey, Ohio, and all points and places within a 30-mile radius of Mansfield, Ohio. Six other carriers filed applications for the same authority and the applications were consolidated for hearing before a Joint Board consisting of one member, an employee of the Public Utilities Commission. The Joint Board filed a report recommending that ALL STATES be granted a certificate to serve the towns of Ashland, Bucyrus, Carey, Galion, Mount Vernon, Perrysville, and Shelby, Ohio, but that its application to serve the entire 30-mile radius of Mansfield, Ohio, be denied. Five intervening motor carriers filed exceptions to this report but ALL STATES did not file any exception. In other words,

ALL STATES accepted the finding of the Joint Board that the evidence showed a need for a *continuance* of its service to the named seven points, and not for the *inauguration* of a new service to the entire 30-mile radius.

The matter was subsequently considered by Division 5 of the COMMISSION which held that all of the seven applications must be denied. All States filed a petition for re-

cations must be denied. ALL STATES filed a petition for re-

by the entire COMMISSION on December 10, 1951. The present litigation followed.

In its report and order denying ALL STATES authority to serve the seven towns, it is contended that the COMMISSION disregarded the evidence establishing the right to such authority and therefore entered an order not based on substantial evidence, and applied rules of decision not applicable to questions which it had for decision and therefore its action was arbitrary and capricious. It held in effect that ALL STATES had burden of proving that the service rendered by other carriers was inadequate and that it had failed to sustain such burden of proof, and the District Court held that the COMMISSION had applied reasonable rules of decision and that its conclusions were supported by the record.

It cannot be overemphasized that ALL STATES, when its application came before Division 5 for decision, was not seeking authority to inaugurate a new service to the 30-mile radius of Mansfield, Ohio. It is true it had originally applied for such authority, but it accepted the recommendation of the Joint Board that it be granted authority to continue to serve the seven towns in question as it now is doing and has been doing for a long period in the past. The decision which the COMMISSION was called upon to make was thus whether it should be granted authority to serve these seven towns. But the COMMISSION treated the ALL STATES application as if it were an application to commence a new

operation for the entire area rather than an application to continue a present service to seven points.

That the COMMISSION so considered the application of ALL STATES is obvious from the following statement on Sheet 5 of the report of the Commission:

> "ALL STATES contends that a grant of the instant application would enable it to render a complete service, both on eastbound and westbound movements, at Carey and at all points within 30 miles of Mansfield. It so operates now under claimed "grandfather" rights."

Continuing on Sheet 20, the report of the COMMISSION states:

> "Among other things, applicant must show that the proposed service is one which the existing carriers are unwilling or unable to render."

By thus misconceiving the question for the decision, the COMMISSION applied the wrong criteria in ruling upon the sufficiency of the proof, and the Court by holding in Conclusion 3 that "the rule of decision applied by the Commission that the burden rested upon the applicant for the certificate of convenience and necessity to prove that the present services rendered in the towns in question by certified carriers is inadequate is a reasonable one" has committed error.

In a proceeding such as this, where an applicant already in the field, seeks authority to continue or extend that service, the COMMISSION may grant the authority without making any finding as to the adequacy or inadequacy of the service rendered by other carriers.

In *C. E. Hall and Sons* v. *United States*, 88 F. Supp. 596 (D. C. Mass.) the Court by Magruder, J., said at page 601:

> "Moreover, it is said that an application for a certificate cannot be granted in the absence of subsidiary finding that the existing facilities of certificated carriers are inadequate; however, that may be where the

applicant is seeking authority to inaugurate a brand-new operation in a field already occupied by certificated carriers adequately equipped to render the service, the Commission was dealing with quite a different situation in the case at bar. The applicant here was already in the field as a competitor of the plaintiffs, and was only seeking removal of certain limitations on its existing authority in order better to serve its customers and would-be customers, several of whom appeared in support of the application. In a somewhat similar case, this Court in A. B. & C. Motor Transp. Co., Inc. v. United States, D. C. 1946, 69 F. Supp. 166, 169, after full consideration, held that a finding of public convenience and necessity "is not invalidated by the absence of a positive finding that existing carriers are not providing adequate transportation facilities" and we added that an increase in competition "is not a reason for denying the Commission's authority to issue a certificate." "

This Court in *Interstate Commerce Commission, et al.* v. *Parker*, 326 U. S. 60, reversed a specially constituted District Court which had set aside an order of the Interstate Commerce Commission granting a certificate because there had been no proof or finding as to the adequacy of the existing service and the ability of other carriers to provide the service.

Appellant submits that in that type of application where the COMMISSION is not required to make a finding of inadequacy of service, that there can be no burden upon an applicant to prove such inadequacy.

Irrespective of the necessity of such proof, however, appellant contends that on the record it is obvious that if, as the COMMISSION found, there is now "reasonably adequate" service to and from the seven points involved; that this is so because of the service which appellant has been and is now rendering and which is necessarily an integral part of that service. The testimony of shippers and the

exhibits showing the steady increase of tonnage through the years amply demonstrate that this is the case.

If this service is terminated by the COMMISSION's order being finally upheld, then this "reasonably adequate" service will terminate with it, because appellant's presently rendered service is an integral part of the service which these particular communities are now receiving. Obviously the public convenience and necessity will not be served by such a result.

The COMMISSION and the District Court erred as to the nature of the evidence submitted by ALL STATES, the COMMISSION stating that ALL STATES relied "almost entirely" on proof of past service, and the Court holding that the decision of the COMMISSION "that evidence of prior service is not conclusive with respect to the issue of convenience and necessity is a reasonable one." ALL STATE did not rest its case on proof of prior service. In addition to that proof it produced shipper witnesses who testified that the service was needed by them presently and would be needed in the future. No proof as to financial ability, equipment, and terminals was introduced as the Joint Board member stated he did not wish such testimony. Furthermore, the COMMISSION by reference to the annual reports filed by ALL STATES had ample proof of its "fitness" from a financial point. Proof of past service, plus the shipper testimony when considered with the other evidence of record clearly established that the public convenience and necessity required the granting of the certificate.

The Questions Are Substantial

This appeal presents for decision important questions with respect to the validity of orders issued by the COMMISSION in disposing of so-called "extension applications" by motor carriers under Section 207(d) of the Motor Carrier Act (49 U. S. C. Sec. 307(a)).

That act provides for the issuance to applicants of certificates "authorizing the whole or any part of the operations covered by the application" upon proof of fitness of the applicant and public convenience and necessity. Whether or not the Interstate Commerce Commission in disposing of such an application may deny it *in toto* in disregard of proof that it should be granted in part is one of the questions presented by this appeal. Stated otherwise the question is whether the COMMISSION, in disposing of the lesser part of the application, may do so as if it were disposing of the entire application. Such a question is not only of importance to the appellant but to all others who may be now or hereafter applicants for certificates under Section 207(a) of the Motor Carrier Act. Decision of this question by the Supreme Court will aid in the administration of the statute.

Another question raised by the appeal is one dealing with burden of proof. May the COMMISSION lay upon an applicant burden of proof as to an issue concerning which it is not required to make a finding? The District Court in this case says, yes. The District Court of Massachusetts has said no (*C. E. Hall & Sons* v. *United States*, 88 F. Supp. 596). Inferentially, at least the Supreme Court said no in *Interstate Commerce Commission, et al.* v. *Parker*, 326 U. S. 60. A definite ruling by this Court would greatly aid the COMMISSION in the administration of the statute and would enable applicants to know what proof they must submit in similar cases.

There is the further question as to whether or not the COMMISSION may disregard evidence favorable to an applicant, unduly emphasize evidence which it considers unfavorable, and reach its decision on the basis of the unfavorable evidence alone. Or must it, as is clearly indicated in *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474, consider all the evidence and reach its decision by giving

due consideration to *all* facts and their bearing upon the precise question presented for decision.

There is also the further question as to whether the District Court in committing the errors complained of followed the ruling in the *Universal Camera* case.

It is earnestly submitted that the questions raised by the appeal are substantial and should be settled by the Supreme Court.

Respectfully submitted,

(S.) H. Russell Bishop,
(S.) Bingham W. Zellmer,
Counsel for Appellant.

EXHIBIT A

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Civil Action No. 28724

ALL STATES FREIGHT, INC., *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

FINAL JUDGMENT

The instant cause was submitted to this statutory Court of three judges constituted and convened pursuant to the provisions of Title 28 U.S.C.A. §§ 2284, 2321 to 2325 incl. on the complaint of the plaintiff All States Freight Inc., the complaint of the intervening plaintiff Dixie-Ohio Express Company, the answers of the defendants, the United States of America and the Interstate Commerce Commission, the answer of the intervenor, the Central Territory Railroads, the respective briefs of the parties, and the oral arguments.

The order of the Interstate Commerce Commission denying the application of the plaintiff All States Freight, Inc. for the issuance of a certificate of convenience and necessity to serve seven towns without restriction within a thirty-mile radius of Mansfield, Ohio, is challenged on narrow and limited grounds. It is asserted that the Order should be set aside and annulled for the reasons that it is not supported by substantial evidence and is arbitrary and capricious.

Upon due consideration of the respective contentions, the Court is of the opinion that there is a rational basis for the conclusion reached by the Commission after weighing the evidence, that there is substantial evidence in support

thereof, and that the finding of the Commission is in strict and full compliance with the requirements of the law.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the prayer of the plaintiffs' complaints to set aside the Order of the Interstate Commerce Commission be and is hereby denied and the complaint is hereby dismissed.

(S.) FLORENCE E. ALLEN,
United States Court of Appeals Judge.
(S.) EMERICH B. FREED,
United States District Judge.
(S.) CHARLES J. McNAMEE,
United States District Judge.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Civil No. 28724

ALL STATES FREIGHT, INC., ET AL., *Plaintiffs,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants*

FINDINGS OF FACT AND CONCLUSIONS OF LAW (as amended by order of May 13, 1952)

The above entitled action having come on for final hearing on March 20, 1952, before the duly constituted District Court of three judges established pursuant to Sections 2284 and 2321-2325, Title 28 of the United States Code, and, the Court having taken the cause under advisement and considered the pleadings and evidence contained in the record made before the Interstate Commerce Commission and heard arguments of counsel, now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. For some time prior to 1935, the All States Freight, Inc. had carried on extensive trucking operation between

the New England and North Atlantic States on the one hand and the Midwestern States on the other. After the enactment of the Motor Carriers Act of 1935, the company filed an application under Section 206 of that Act on January 29, 1936, asking for extensive "grandfather" rights throughout the entire area which it then served. On July 1, 1940 the company filed an application under Section 207 of the Motor Carriers Act of 1935, asking for extensive operating rights under that Section, making a claim of general convenience and necessity for such rights in the general territory which it then served. These two applications were consolidated, and, after protracted hearings litigation, the Interstate Commerce Commission issued an order on January 16, 1950, granting extensive regular routes on the application under Section 206 of the Motor Carriers Act and denying the application under Section 207 of that Act *in toto*.

2. In addition to the regular routes between the North Atlantic Seaboard and the Middlewest granted in the Commission's order of January 16, 1950, the Commission granted the applicant extensive irregular routes to towns lying in territory adjacent to the regular routes. Among the irregular routes thus granted were routes to all points north of Highways 40 and 42, which run across Ohio, on the one hand, and all points on regular routes granted, including all off route points, on the other hand. This territory comprises most of Northern Ohio. Under the terms of the order, these irregular routes were limited to pickup service of east bound shipments and the delivery of west bound shipments moving over regular routes.

3. The town of Mansfield, Ohio, is situated on a regular route of All States Freight, Inc. granted by the order of the Commission on January 16, 1951. The towns of Carey, Bucyrus, Shelby, Ashland, Perryville, Mount Vernon, and Galion, Ohio, lie around Mansfield and fall within the territory to which the irregular routes were granted to furnish service, to pick up east bound shipments, and to deliver west bound shipments.

4. For an undisclosed period in the past, All States Freight, Inc. has been serving the seven named towns with-

out restriction, hauling freight both east and west. After the entry of the order of the Commission on January 16, 1950, which restricted the nature of the service of the seven towns, All States Freight, Inc. petitioned the Commission for an order staying so much of its order of January 16, as restricted the nature of the service to the towns. The Commission granted the requested stay, which has been extended from time to time and is still in operation pending the disposition of this case. All States Freight, Inc. continues to serve the seven towns at the present time without restriction.

5. In May, 1951, All States Freight, Inc. filed an application under Section 207 of the Motor Carrier Act requesting a certificate of convenience and necessity to serve all points and places within a thirty-mile radius of Mansfield, Ohio, and Carey, Ohio. Six other carriers filed applications for similar authority. Ten motor carriers and certain railroads filed protest to all of the applications. The applications were consolidated and hearings were held before a Joint Board appointed by the Commission, and evidence was submitted by All States Freight, Inc., other applicants, and the protestants. The Joint Board filed a report recommending that All States Freight, Inc. be granted authority to serve the seven towns in question without restriction. All of the protestants, except the railroads, filed exceptions to the report of the Joint Board.

6. On January 17, 1951, Division 5 of the Interstate Commerce Commission filed a report and order which denied all of the applications for certificates to serve the area in question. All States Freight, Inc. filed a petition for rehearing, which was denied by the full Commission on December 10, 1951, thus making the order of Division 5 of January 17, 1951, the effective order of the Commission.

7. In its report, the Commission stated that the burden was on the applicant to establish that the present authorized service in the seven towns in question was inadequate. The Commission likewise stated in the report that though evidence of prior service on the part of All States Freight, Inc. was to be given some weight in connection with its application, it was not to be considered to be conclusive in respect

of the convenience and necessity of the service. After reviewing the evidence in its report and making subordinate findings of fact with respect to each of the seven towns, the Commission found that there was not sufficient proof that the existing services offered or rendered by Certified Carriers were inadequate. On this basis, it denied the application for the certificate by All States Freight, Inc.

Conclusions of Law

1. This Court has jurisdiction over the cause and of the parties hereto.

2. The Commission had jurisdiction over the proceedings wherein the said report and order filed on January 17, 1951 were made, and had jurisdiction to make said order and report.

3. The rule of decision applied by the Commission that the burden rested upon the applicant for the certificate of convenience and necessity to prove that the present services rendered in the towns in question by Certified Carriers is inadequate is a reasonable one.

4. The rule and decision of the Commission that evidence of prior service is not conclusive with respect to the issue of convenience and necessity is a reasonable one.

5. On the entire record as a whole, the findings of the Commission that the applicant had failed to sustain the burden of proving that the existing services in the towns in question were inadequate was reasonable.

6. The Commission was acting within the proper limits of its discretion in holding that public convenience and necessity did not require the issuance to applicant of a certificate.

7. The order of the Commission denying the certificate of convenience and necessity to the applicant is legal and valid.

8. Injunction should be denied and the suit should be dismissed.

FLORENCE E. ALLEN
EMRICH B. FREED
CHARLES J. MCNAMEE

Date: —— —, 1952.

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

FILED
C. B. Watkins, Clerk
U.S. District Court, NDO
Jun 9 1952 9:36 a.m.

CIVIL No. 28724

ALL STATES FREIGHT, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL

MOTION TO AFFIRM

Appellees, United States of America and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the revised rules of the Supreme Court of the United States, move that the judgment of the district court be affirmed.

This is a direct appeal from the final judgment entered on April 28, 1952, by a district court of three judges constituted pursuant to 28 U.S.C. 1253, 2284 and 2325, dismissing an action to set aside an order of the Interstate Commerce Commission. The appeal was allowed on May 23, 1952, and the appeal papers were served on May 26, 1952. The order of the Commission which is attacked in this proceeding denied appellant's application under Section 207(a) of the Interstate Commerce Act, 49 U.S.C. 307(a), for a certificate of convenience and necessity to serve without restriction, as intermediate or off-route points, seven towns lying within a 30-mile radius of Mansfield, Ohio. Facts material to the issues raised by the attack on this order may be briefly stated.

Prior to 1935 appellant had carried on extensive trucking operations between New England and the North Atlantic states on the one hand and the Midwestern states on the other. After enactment of the Motor Carriers Act of 1935, appellant filed an application under Section 206 of the Act asking for extensive grandfather rights throughout the area which it had served. It later filed an application under Section 207 of the Act for operating rights of substantially the same scope as those sought in the Section 206 application, claiming that the service thereby sought is required by public convenience and necessity. The Commission consolidated the two applications and, after

protracted proceedings, issued an order on January 16, 1950, which granted extensive grandfather rights on the Section 206 application and denied the Section 207 application *in toto*.

The order of January 16, 1950, authorized, in addition to extensive regular route service, extensive irregular route service with respect to towns in territory adjacent to the regular routes. The latter authorization, which included towns within a 30-mile radius, of Mansfield, Ohio, was limited to pick-up of eastbound shipments and delivery of westbound shipments. Appellant did not bring a court proceeding to have the order denying its Section 207 application set aside. However, it filed with the Commission in May 1950 an application under Section 207 for authority to serve without restriction towns within a 30-mile radius of Mansfield, and the Commission has, by various orders, extended the effective date of the order of January 16, 1950, as to the restrictions which it imposes upon the service which appellant is authorized to furnish in towns within the general orbit of Mansfield.[1] Appellant has therefore continued to serve these towns without restriction.

---

[1] The extensions granted by the Commission ran to May 13, 1952. The district court stayed the effective date of the Commission's order to May 27, 1952, on which date this Court, by Mr. Justice Reed, continued the stay pending timely filing of the appeal, and if the appeal is timely filed, pending issuance of the Court's mandate.

Ten motor carriers and certain railroads protested appellant's application. After hearings which resulted in limiting appellant's application to seven of the towns within the area near Mansfield, Division 5 of the Commission filed a report and order on January 17, 1951, denying the application, and on December 10, 1951, the full Commission denied appellant's petition for reconsideration. The Commission, by Division 5, after making subsidiary findings of fact as to each of the seven towns, found that the evidence failed to establish that the operating rights sought by appellant were required by public convenience and necessity. The Commission found that the evidence presented in support of appellant's application "is meager and does not establish any real need for additional motor carrier service." The report further states:

> While evidence of past operations are entitled to consideration in determining the issue of public convenience and necessity, the weight to be accorded such evidence must be determined on the basis of its relationship to other evidence presented, and cannot, standing alone, control. All States relies here almost entirely upon the fact that operations to and from the Ohio points under consideration were conducted by it during an undisclosed period in the past, that such services were utilized by certain shippers in the Ohio area,

> and that the shippers now seek a continuance of the services. That alone is not such a sufficiency of real evidence upon which we may properly predicate a finding that the service is required by the public. * * * Here, for example, most of the communities in which the supporting shippers are located are very small and traffic originating at those points is generally light. * * * Where, as here, the existing authorized services of other motor carriers are reasonably adequate, and where the evidence of record fails to reveal that the proposed service offers any substantial improvement over existing service as required by supporting shippers, the application will be denied.

The District Court in entering a final judgment dismissing appellant's complaint, stated that it had concluded "that there is a rational basis for the conclusion reached by the Commission after weighing the evidence, that there is substantial evidence in support thereof, and that the finding of the Commission is in strict and full compliance with the requirements of the law."

We submit that the appeal presents no substantial question. The questions which are presented are whether the Commission's determination is contrary to the evidence and whether the Commission erred in ruling that appellant had

the burden of showing inadequacy in the service offered by presently certificated carriers.

The contention that the Commission's finding is contrary to the evidence clearly is without substance. The Commission's report shows on its face that the Commission had before it evidence justifying the conclusion that presently certificated carriers furnished adequate service to shippers in the towns in question. The conclusion to be drawn from the evidence as to the public convenience and necessity of the additional service for which appellant sought authorization involves an exercise of administrative judgment. At least in the absence of a convincing showing of error, the courts may not set aside the determination made by the Commission. In *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 65, this Court said:

> The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. Cf. *Powell* v. *United States,* 300 U.S. 276, 287. This, of course, gives administrative discretion to the Commission, cf. *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 87-88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances.

The contention that the Commission erred in ruling that appellant "must show affirmatively that the proposed service is one which the existing carriers are unwilling or unable to render" also does not present a substantial question. The rule that an applicant under Section 207 has the burden of showing inadequacy in the service offered by existing carriers is of long standing and has received judicial approval. It was tacitly recognized in *Interstate Commerce Commission* v. *Parker, Supra,* at p. 69, and expressly declared in the dissenting opinion in that case (p. 74 and decisions cited in note 1). In *Hudson Transit Lines* v. *United States,* 82 F. Supp. 153 (S.D.N.Y.), affirmed 338 U.S. 802, which involved a grant of operating authority under Section 207, the three-judge district court said (p. 157):

> The Commission has frequently held that under § 207 of the Act, 49 U.S.C.A. § 307, there must be an affirmative showing not only that a common carrier service is required in the convenience of the public but also that it is a necessity, and that the later element includes a showing that present facilities are inadequate. *Pan American Bus Lines, Operation,* 1 M.C.C. 190, 203; *Bluenose Bus Co. Ltd., Common Carrier Application,* 1 M.C.C. 173, 176; *Richard L. Richards, Extension of Operations,* 6 M.C.C. 80, 81; *Ohio Transportation Co., Common Carrier Application,*

29 M.C.C. 513, 520; *Royal Cadillac Service, Inc., Common Carrier Application,* 43 M.C.C. 247, 259. The Courts, too, have recognized inadequacy of existing facilities as a basic ingredient in the determination of public "necessity". *Inland Motor Freight* v. *United States,* D.C.E.D. Wash. 60 F. Supp. 520, 524.

Appellant contends that the usual rule as to burden of proof does not apply where the applicant is presently rendering service for which it seeks authority. *C. E. Hall & Sons* v. *United States,* 88 F. Supp. 596 (D Mass.), is cited as authority for this proposition.

In the *Hall* case a motor common carrier held a certificate authorizing transportation of "machinery." It sought and was granted authority to transport commodities which, because of their size and weight, require the use of special equipment or specialized handling. The carrier had expensive specialized equipment for loading, transporting, unloading and installing all kinds of heavy commodities, some of which could not be classified as "machinery." The Commission found that the limited additional authority which it was granting would have no material adverse effect on the operations of existing carriers. In a suit to set aside the Commission's order, the issue before the court was not whether the applicant for a certificate had the burden of showing inadequacy in the facilities of other certificated carriers, but

whether the Commission's order, re-defining and somewhat enlarging the class of commodities which the carrier is authorized to transport, was rendered invalid because the Commission had failed to find that other carriers were unable to handle commodities coming within the scope of the enlarged definition.

In the instant case, unlike the *Hall* case, the carrier wishes to engage in transportation which the Commission has never at any time authorized. Appellant has engaged in this transportation under color of an unfounded claim of grandfather rights. As the Commission and the district court have correctly held, appellant's prior unauthorized transportation, while a factor to be given consideration, does not relieve it of the burden of establishing the elements which are essential to a determination that public convenience and necessity require continuation of this transportation.

Appellant also suggests that in the *Parker* case, *supra,* this Court upheld a certificate issued under Section 207 notwithstanding no finding of inadequacy in the service of presently certificated carriers. But the basis of the Court's decision was that inadequacy in existing service is not essential to the validity of a grant of operating authority where, as in that case, the Commission had found on adequate evidence that the service authorized by its certificate, namely a motor service to be

coordinated with railroad service, "was of a different character from that of the existing motor service." 326 U.S. 69.

For the foregoing reasons, we submit that this appeal presents no substantial question. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

/s/ PHILIP B. PERLMAN
Solicitor General.

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JUNE 1952.

☆ U.S. GOVERNMENT PRINTING OFFICE 1952—214613/P.O. 24

Office - Supreme Court, U. S.
FILED
JUL 1 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 166

ALL STATES FREIGHT, INC., *Appellant,*

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

MOTION OF CENTRAL TERRITORY RAILROADS TO AFFIRM

CARL HELMETAG, JR.,
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Counsel for Appellee.

SQUIRE, SANDERS & DEMPSEY,
Of Counsel.

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Filed C. B. Watkins, Clerk, U. S. District Court, NDO, June 23, 1952, 2:23 p. m.

IN THE DISTRICT COURT OF THE UNITED STATES
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil No. 28724

ALL STATES FREIGHT, INC., *Plaintiff*,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

MOTION TO AFFIRM

Come now the Central Territory Railroads, appellees, and move that the judgment of the district court be affirmed pursuant to Rule 12, paragraph 3, of the revised rules of the Supreme Court of the United States.

This appeal is from the final judgment entered on April 28, 1952, by a three-judge district court constituted pursuant to 28 U. S. C. 1253, 2284 and 2325, dismissing a complaint to set aside an order of the Interstate Commerce Commission dated December 10, 1951. The order of the Commission denied appellant's application under Section 207(a) of the Interstate Commerce Act, 49 U. S. C. 307(a), for a certificate of convenience and necessity to serve without restriction, as intermediate or off-route points, seven towns located within a 30-mile radius of Mansfield, Ohio,

namely, Ashland, Bucyrus, Carey, Galion, Mt. Vernon, Perryville and Shelby, Ohio.

Appellees submit that the questions on which the decision of this case depend are so unsubstantial as not to need further argument. The only consideration involved in this appeal is whether the Commission's findings and order are supported by substantial evidence. In exercising jurisdiction committed to them under 49 U. S. C. A. §§ 17(9) and 305(g), and 28 U. S. C. A. §§ 41 (27, 28), 42-47, the courts are not to substitute their judgment for the findings and conclusions made by the Commission which were within the scope of its powers. *State of New York* v. *United States,* 331 U. S. 284, 67 S. Ct. 1207 (1947); *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475, 62 S. Ct. 722 (1942); *United States* v. *American Trucking Ass'n,* 310 U. S. 534, 60 S. Ct. 1059 (1940); *Shields v. Utah Idaho Cent. R. Co.,* 305 U. S. 177, 59 S. Ct. 160 (1938). In *Rochester Telephone Corporation* v. *United States,* 307 U. S. 125, 59 S. Ct. 754 (1939), the court said at page 762 of 59 S. Ct.:

> "Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Commission* v. *Illinois Central R. R.,* 215 U. S. 452, 470, 30 S. Ct. 155, 160, 54 L. Ed. 280; *Interstate Commerce Commission* v. *Union Pacific R. R.,* 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308."

No questions of Commission's constitutional power or statutory authority are raised in this appeal and the contention by appellant that the Commission's findings are contrary to the evidence is without foundation.

All evidence of record was considered by the Commission and substantial evidence exists to support its conclusions. In its report, the Commission found "that the evidence presented in connection with these points (seven towns within a 30-mile radius of Mansfield) is meagre and does not establish any real need for additional motor carrier service"; and, after further discussing the evidence, concluded:

> "Where, as here, the existing authorized services of other motor carriers are reasonably adequate, and where the evidence of record fails to reveal that the proposed service offers any substantial improvement over existing service as required by supporting shippers, the application will be denied."

An appeal was taken from this decision and the three-judge district court, *inter alia,* approved findings of the Commission that applicant had failed to prove that the present service rendered by existing carriers was inadequate, and that public convenience and necessity required the issuance of the certificate. Obviously, the issues raised in this appeal are clearly unsubstantial and have been adequately disposed of by the order of the Interstate Commerce Commission and the decision of the three-judge district court dismissing the complaint. Allowance of this appeal would result in merely a waste of time and money for all parties concerned.

SQUIRE, SANDERS & DEMPSEY,
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R. R. ARTZ,
(s) R. R. ARTZ,
Attorneys for Railroads.

June 20, 1952.